Supreme Court, U.S.

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No. _____

In The

Supreme Court of the United States

October Term, 1997

HOOTERS OF AMERICA, INC.,

Petitioner,

v.

CAROLINA WINGS, INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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83 pp

QUESTION PRESENTED

Whether the doctrine of *res judicata* prevents a breach of contract plaintiff who has recovered on a final judgment from instituting a subsequent suit under the same contract, where the contract was entirely breached, if breached at all, at the time of the filing of the first lawsuit.

LIST OF PARTIES TO THE PROCEEDING BELOW

The caption of the case in this Court contains the names of all parties to the Eleventh Circuit Court of Appeals proceeding whose judgment is sought to be reviewed.

RULE 29.6. LISTING

Petitioner Hooters of America, Inc. has no parent companies and all of its nonwholly owned subsidiaries and affiliates are listed below.

Athens Wings, Inc. f/k/a Hooters of Athens, Inc. (closed)

Interstate Race Management, Inc., a Florida corporation

Hooters of Augusta, Inc.

Hooters of Birmingham, Inc.

Hooters of Biloxi, Inc. (a corporation to be formed)

Hooters of Buckhead, Inc. (closed)

Hooters of Casselberry, Inc.

Hooters of Charlotte, Inc.

Hooters of Charlotte II, Inc.

Hooters of Charlotte Venture

Hooters of Church Street, Inc.

Hooters of Columbia, Inc.

Hooters of Conyers, Inc.

Hooters of Cumberland, Inc.

Hooters of Daytona, Inc.

Hooters of Douglasville, Inc.

Hooters of Duval II, Inc.

RULE 29.6. LISTING – Continued

Hooters of Fairfax, Inc.

Hooters of Fayetteville, Inc.

Hooters of Fayetteville (Arkansas), Inc.

Hooters of Flint, Inc.

Hooters of Florissant, Inc.

Hooters of Grand Avenue, Inc.

Hooters of Grand Rapids, Inc.

Hooters of Greenfield, Inc.

Hooters of Greensboro, Inc.

Hooters of Greenville, Inc.

Hooters of Gwinnett, Inc.

Hooters of Harborplace, Inc.

Hooters of Hilton Head, Inc.

Hooters of Honolulu, Inc.

Hooters of Huntsville, Inc.

Hooters of Jacksonville Landing, Inc.

Hooters of Jacksonville, Inc.

Hooters of Jupiter, Inc.

Hooters of Kirkman Road, Inc.

Hooters of Kissimmee L.P.

Hooters of Kissimmee, Inc.

RULE 29.6. LISTING – Continued

Hooters of Lakeland II, Inc.

Hooters of Leon, Inc.

Hooters of Macon, Inc.

Hooters of Manassas, Inc.

Hooters of Manchester Road, Inc.

Hooters of Maryland Heights, Inc.

Hooters of Melbourne, Inc.

Hooters of Memorial Drive, Inc.

Hooters of Muskegon, Inc.

Hooters of Myrtle Beach, Inc.

Hooters of Newnan, Inc.

Hooters of Norcross, Inc.

Hooters of Norman, Inc. (closed)

Hooters of Oklahoma City, Inc.

Hooters of Orlando, Inc. a/k/a Hooters of Altamonte Springs

Hooters of Pointe Orlando, Inc.

Hooters of Raleigh, Inc.

Hooters of Raleigh Venture

Hooters of Regency, Inc.

Hooters of Rockville, Inc.

RULE 29.6. LISTING – Continued

Hooters of Rosville, Inc.

Hooters of Roswell, Inc.

Hooters of St. Louis Union Station, Inc.

Hooters of Snellville, Inc.

Hooters of South County, Inc.

Hooters of South Lakeland, Inc.

Hooters of South Myrtle Beach, Inc.

Hooters of South Oklahoma, Inc.

Hooters of Sterling Heights, Inc.

Hooters of Tara, Inc.

Hooters of Taylor, Inc.

Hooters of Traverse City, Inc.

Hooters of Troy, Inc.

Hooters of Tulsa, Inc.

Hooters of Underground, Inc.

Hooters of West Palm Beach, Inc.

Hooters of Wilmington, Inc.

Peach State Race Management, Corp.

USA International Race Management, Inc.

USA Formula 2, Inc. (inactive)

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PETITION FOR WRIT OF CERTIORARI

Hooters of America, Inc. ("Hooters") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

None of the opinions or orders entered in this case by the lower courts are reported.

STATEMENT OF JURISDICTION

Hooters seeks review of a judgment entered by the United States Court of Appeals for the Eleventh Circuit on January 16, 1998. The United States Court of Appeals for the Eleventh Circuit denied Hooters' suggestion of rehearing *en banc* and petition for rehearing on March 18, 1998. The Supreme Court's jurisdiction to review this matter on a writ of certiorari is based on 28 U.S.C. § 1254.

STATUTORY PROVISIONS INVOLVED IN THE CASE

> If a contract is entire, only one action may be maintained for a breach thereof; but, if it is severable or if the breaches occur at successive periods in an entire contract, an action will lie for each breach; but all the breaches occurring up to the commencement of the action must be included therein.

Ga. Code Ann. § 13-6-14 (1982).

> The . . . judicial proceedings of any court of any . . . State, Territory or Possession [of the United States] . . . shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

28 U.S.C. § 1738.

STATEMENT OF THE CASE

In 1988, Hooters and Carolina Wings, Inc. ("Carolina Wings") entered into a restaurant development agreement under which Hooters granted Carolina Wings "the right of first refusal to participate in the ownership of up to six (6) Hooter's . . . Restaurants." (App. 44). Pursuant to the development agreement, Hooters offered, and Carolina Wings accepted, participation in two Hooters' restaurants. (App. 2, 10). Hooters then offered Carolina Wings the right to participate in the ownership of four additional restaurants, but Carolina Wings declined to participate in any of the four offered restaurants. (App. 2, 10).

Hooters then developed additional restaurants without first offering Carolina Wings the right to participate in the ownership of those restaurants. (App. 2, 10). Carolina Wings, interpreting the development agreement as requiring Hooters to continue offering restaurants until such time as Carolina Wings actually accepted participation in six restaurants, viewed this development of additional restaurants without it first being offered the right

to participate in the restaurants as a breach of the development agreement. (App. 11). Accordingly, in May of 1992, Carolina Wings sued Hooters in Florida state court alleging that Hooters breached the development agreement by opening a restaurant in Charlotte, North Carolina without first offering Carolina Wings the opportunity to participate in the ownership of the Charlotte restaurant. (App. 11).

Hooters failed to answer the 1992 state court complaint, and a default was entered against it. (App. 11). A trial on damages was then held, and, again, Hooters failed to appear. (App. 11). At the conclusion of the state court damages trial, a $5.4 million default judgment was entered against Hooters. (App. 11-12).

The $5.4 million state court judgment was based on Hooters' failure to offer Carolina Wings four specific Hooters restaurants – Charlotte II, St. Louis I, Gwinnett, and Harborplace. (App. 2, 11-12). The evidentiary basis for the award was the sworn testimony of Carolina Wings' principal owner that under the development agreement Carolina Wings was entitled to participate in six Hooters restaurants, that it participated in two, and that four additional restaurants had been developed in which Carolina Wings would have participated had they been offered. (App. 11).

After the trial on damages was concluded, Hooters finally appeared, and appealed the $5.4 million default judgment. (App. 12). On appeal, Florida's First District Court of Appeal affirmed that portion of the judgment applicable to the Charlotte II restaurant ($1.5 million), but reversed and remanded as to the other three restaurants,

holding that Carolina Wings' complaint failed to put Hooters on notice of any claim for restaurants other than Charlotte II. *Hooters of America, Inc. v. Carolina Wings, Inc.*, 655 So.2d 1231 (Fla. 1st DCA 1995). (App. 25-37). On remand, however, rather than amending its pleadings with respect to the three additional restaurants claimed, Carolina Wings elected to seek entry of an amended final judgment as to Charlotte II only. (App. 3, 12). Hooters satisfied the amended final judgment in full. (App. 3).

Immediately following Hooters' satisfaction of the $1.5 million judgment, Carolina Wings filed the instant suit, seeking to recover damages for Hooters' failure to offer it participation in the St. Louis II, Myrtle Beach II, and Greensboro restaurants – three restaurants different from, and more profitable than, the three restaurants sought in the first action. In this second suit, Carolina Wings sued under the very same development agreement it sued under in the first action, and alleged the same breach of that same agreement (i.e., that it had the contract right to participate in the ownership of six restaurants, but that Hooters only allowed it to participate in two). (App. 13).

On cross motions for summary judgment in this second suit, District Court Judge William Terrell Hodges recognized that on remand from the appellate court decision in the first action, Carolina Wings could have immediately amended its pleadings and sought recovery for the originally omitted restaurants, "but chose not to do so and accepted a reduced judgment instead." (App. 20-21). Judge Hodges then entered summary final judgment in favor of Hooters, holding that:

> at the time the first action was initiated there were four stores that [Carolina Wings] would have accepted under the contract in addition to the two in which it had already invested. The breach of the entire contract was therefore full, complete and mature, and a "cause of action" for that breach of the contract as a whole could have been prosecuted in that action as, indeed, [Carolina Wings] attempted but then abandoned. It follows that [Carolina Wings'] entire "cause of action" for a breach – any breach – of the contract between the parties has been adjudicated and that this action is precluded by res judicata.

(App. 23).

On Carolina Wings' appeal of this summary judgment, the United States Court of Appeals for the Eleventh Circuit reversed Judge Hodges' decision, holding for the first time in the Eleventh Circuit that a breach of contract plaintiff may recover a final judgment in one action, and then prosecute a second suit under the same contract on a claim which was already mature at the time of the bringing of the first lawsuit.

BASIS FOR FEDERAL JURISDICTION IN THE TRIAL COURT

This case is a diversity action which was removed from the Circuit Court of Duval County, Florida by Hooters. The District Court's subject matter jurisdiction was based on 28 U.S.C. §§ 1332 and 1441.

REASONS FOR GRANTING THE PETITION

The Eleventh Circuit's reversal of the trial court's *res judicata* summary judgment is premised on the legal conclusion that Carolina Wings' first lawsuit and this lawsuit do not arise out of the same "cause of action." This legal conclusion is directly contrary to United States Supreme Court, Eleventh Circuit, and Florida precedent.

In order to constitute the same "cause of action," two lawsuits do *not* have to involve the same exact facts. Rather, two causes of action are "identical," and are therefore subject to the bar of res judicata, if they arise out of the same overall transaction. *Nevada v. United States*, 463 U.S. 110, 129-33, 130-31 n.12 (1983); *Pelletier v. Zweifel*, 921 F.2d 1465, 1502 (11th Cir. 1991); *In re Justice Oaks II, Ltd.*, 898 F.2d 1544, 1551 (11th Cir. 1990); *Puff 'N Stuff of Winter Park, Inc. v. Federal Trust Bank, F.S.B.*, 945 F. Supp. 1523, 1529-30 (M.D. Fla. 1996) (citing *In re Justice Oaks II, Ltd.*, as a case "acknowledging Florida's adoption of the 'transactional' test set forth in Restatement (2d) of Judgments § 24 (1982)"), *aff'd*, 129 F.3d 616 (11th Cir. 1997); *Signo v. Florida Farm Bureau Cas. Ins. Co.*, 454 So.2d 3, 5 (Fla. 4th DCA 1984) (quoting the Restatement (Second) of Judgments § 24, and holding that Florida follows the transactional approach to res judicata, not a more narrow approach which requires every fact of both suits to be the same); *Beck v. Pennsylvania Nat'l Mut. Cas. Ins. Co.*, 279 So.2d 377 (Fla. 3d DCA 1973) (following the transactional approach to res judicata in a breach of contract action).

Here, it is undisputed that both lawsuits center on the breach of the development agreement that was

entered into between Hooters and Carolina Wings. The facts essential to both lawsuits are the same: Carolina Wings is entitled to six restaurants (or six offers of restaurants) under the development agreement; Carolina Wings has participated in two restaurants; and at least four additional restaurants have been developed in which Carolina Wings would have participated had they been offered. The only facts which differ in the two lawsuits are the specific restaurants which Carolina Wings uses for its damages calculations.

The key point is that the "transaction" Carolina Wings sued under in both suits was the *complete* breach of the development agreement. The fact that Carolina Wings selected three different restaurants to measure its damages for that breach does not change the essential character of either lawsuit – they both sought recovery for Hooters' complete breach of a six restaurant development agreement. Under the transactional approach to res judicata (which has heretofore been adopted by this Court, by the Eleventh Circuit, and by the state courts of Florida), both lawsuits arose out of the same contractual transaction, and, therefore, consist of the same cause of action. *See generally Petromanagement Corp. v. Acme-Thomas Joint Venture*, 835 F.2d 1329, 1336 (10th Cir. 1988) (holding that a contract should be considered a single transaction, "so that all claims of contractual breach not brought in an original action would be subject to [the] bar of claim preclusion, so long as the breaches antedated the original action"). As this Court stated in *Nevada v. United States*:

> A cause of action does not consist of facts, but of the unlawful violation of a right which the facts show. The number and variety of the facts

> alleged do not establish more than one cause of action so long as their result, whether they be considered severally or in combination, is the violation of but one right by a single legal wrong. . . . '[The facts] do not constitute the cause of action, but they show its existence by making the wrong appear.'

463 U.S. at 130-31 n.12 (affirming summary judgment on the grounds of res judicata) (quoting *Baltimore S.S. Co. v. Phillips*, 274 U.S. 316, 321 (1927)).

Since both lawsuits at issue here arose out of the same base transaction, suit number two is barred by res judicata. *See, e.g., Baltimore S.S. Co. v. Phillips*, 274 U.S. 316, 320 (1927) (" '[T]he whole tendency of our decisions is to require a plaintiff to try his whole cause of action and his whole case at one time.' " (quoting *United States v. California & Oregon Land Co.*, 192 U.S. 355 (1904))); 18 Charles A. Wright, et al., *Federal Practice and Procedure* § 4408 (1981) ("Contract cases often can be resolved by a simple rule that the first suit must claim every breach that has then occurred.").

As acknowledged by its own sworn testimony, in that first action Carolina Wings was aware that the contract had been completely breached and that the transaction was over. Following remand from the state appellate court, if Carolina Wings had wanted to correct its pleading error and recover for the three restaurants originally claimed (or for the three claimed here), it could have, even then, amended its pleadings and reopened the case for a trial on damages. *See, e.g., Baltimore S.S. Co.*, 274 U.S. at 324, 325; *Federal Land Bank v. Brooks*, 139 Fla. 506, 190 So. 737 (1939). Instead, to avoid putting its $1.5 million

damages judgment at risk, Carolina Wings elected (as the Eleventh Circuit's opinion notes), to seek and have satisfied an "amended final judgment as to Charlotte II only." By taking that action, Carolina Wings waived its right to pursue any further damages claims under the development agreement.

CONCLUSION

As held many times by this Court, under the doctrine of *res judicata* "[a] final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 398 (1981). In Carolina Wings' first case, it not only could have raised issues concerning Hooters' breach of its obligation to offer Carolina Wings four additional restaurants, it did, in fact, raise such issues. Accordingly, the final judgment in that first action precludes Carolina Wings from re-litigating this dispute with Hooters. "This Court has long recognized that 'public policy dictates that there be an end to litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties.' " *Id.* at 401 (quoting *Baldwin v. Traveling Men's Ass'n*, 283 U.S. 522, 525 (1931)). As Carolina Wings and Hooters have once litigated Hooters' total obligations under the development agreement, all disputes concerning that issue should be considered as forever settled between Hooters and Carolina

Wings, and the Eleventh Circuit's holding to the contrary should be reversed by this Court.

Respectfully submitted,

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[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 96-3541

D.C. Docket No. 95-870-CIV-J-99(H)

CAROLINA WINGS, INC.,
a Florida corporation,

Plaintiff-Appellant,
Cross-Appellee,

versus

HOOTERS OF AMERICA, INC.,
a Georgia corporation,

Defendant-Appellee,
Cross-Appellant.

Appeals from the United States District Court
for the Middle District of Florida

(January 16, 1998)

Before HATCHETT, Chief Judge, EDMONDSON and COX, Circuit Judges.

PER CURIAM:

Carolina Wings, Inc. ("Carolina Wings") appeals from the district court's grant of summary judgment in favor of Hooters of America, Inc. ("Hooters") on res judicata grounds. Hooters cross-appeals from the district court's

grant of partial summary judgment in favor of Carolina Wings on collateral estoppel grounds. We reverse the grant of summary judgment in favor of Hooters and affirm the grant of partial summary judgment in favor of Carolina Wings.

I. BACKGROUND

This breach of contract action involves Carolina Wings and Hooters, who are parties to a "Development Agreement" ("the agreement") that gives Carolina Wings the "right of first refusal to participate in the ownership of up to six Hooters restaurants." Carolina Wings participated in opening two restaurants with Hooters; one is located in Raleigh and the other in Charlotte ("Charlotte I"). Carolina Wings declined the next four offers made by Hooters to participate in additional restaurants.

Carolina Wings sued Hooters in Florida state court for breach of contract upon discovering that Hooters had not offered participation in a subsequent development in Charlotte, North Carolina ("Charlotte II"). A default judgment was entered against Hooters. At the trial on damages, the state court found that not only had Hooters breached the agreement with regard to Charlotte II, but that it had breached the contract with respect to the St. Louis I, Gwinnett, and Harborplace restaurants as well. Final judgment was entered for Carolina Wings and damages were awarded for all four restaurants. On appeal, the First District Court of Appeal of Florida affirmed the award of damages as to the Charlotte II restaurant, but reversed and remanded as to the other three restaurants, finding that Carolina Wings only pled breach with regard

to Charlotte II, and not with regard to the other three restaurants. *See Hooters of America, Inc. v. Carolina Wings, Inc.*, 655 So.2d 1231, 1234 (Fla. 1st DCA 1995). On remand, Carolina Wings chose not to amend its pleadings and sought amended final judgment as to Charlotte II only. Hooters paid the judgment in full.

Carolina Wings brought a second action in Florida state court seeking a declaratory judgment as to the rights of the parties under the agreement and damages for breach of contract with respect to three other restaurants, namely the St. Louis II, Myrtle Beach II, and Greensboro restaurants. On removal of the case to federal district court, Carolina Wings moved for partial summary judgment on the grounds of collateral estoppel, or issue-preclusion, contending that prior litigation between the parties had already determined the meaning of the agreement sued upon. Hooters also filed a motion for summary judgment, contending that the prior litigation resolved the entire controversy between the parties and barred Carolina Wings' instant suit under the doctrines of res judicata and judicial estoppel. The district court granted both parties' motions and entered final judgment in favor of Hooters. This appeal follows.

II. DISCUSSION

A. Carolina Wings' Appeal

Carolina Wings claims that the district court erred in granting summary judgment in favor of Hooters, finding that Carolina Wings' prior contract action precludes a

second action for subsequently accruing claims.[1] Application of res judicata is an issue of law we review *de novo*. *See Aquatherm Industries, Inc. v. Florida Power & Light Co.*, 84 F.3d 1388, 1391 (11th Cir. 1996). Pursuant to 28 U.S.C. § 1738, federal courts must give preclusive effect to a state-court judgment whenever the courts of the state from which the judgment emerged would do so. *See Farred v. Hicks*, 915 F.2d 1530, 1532 (11th Cir. 1990). Therefore, we look to the res judicata and issue-preclusion law of Florida.

Carolina Wings contends that it is not precluded from suing for breach regarding the St. Louis II, Myrtle Beach II, and Greensboro restaurants because they were developed after commencement of the first action and the breach as to each restaurant is separate and distinct; thus, res judicata is not applicable.

Hooters counters by claiming that the doctrines of res judicata and judicial estoppel preclude Carolina Wings from bringing the second action. Hooters contends that because Carolina Wings identified three acceptable restaurants in the first action, that it is now judicially estopped from suing for three other restaurants that were subsequently built by Hooters. We find Hooters' arguments unpersuasive.

The doctrine of res judicata contemplates that where a second suit is upon the same cause of action and

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[1] In light of our disposition of this issue, we need not address Carolina Wings' other contention that the district court erred in finding that the Gwinnett restaurant was developed prior to the first action.

between the same parties as the first, the first judgment is conclusive on all matters which were or could have been adjudicated. *See Albrecht v. State*, 444 So.2d 8, 12 (Fla. 1984). Res judicata bars a second suit when final judgment has been entered in a prior suit by a court of competent jurisdiction and the following elements are met: (1) identity of the thing sued for; (2) identity of the cause of action; (3) identity of parties; and (4) identity of the quality in the person for or against whom the claim is made. *See id.* at 11, 12.

One element is lacking here. There is no identity of the causes of action. The record reveals that all three restaurants at issue in the second action, St. Louis II, Myrtle Beach II, and Greensboro, were developed after the first action was commenced. Thus, these claims had not yet accrued and could not have been litigated in the first action because Carolina Wings could not have pled or proven breach or damages as to those restaurants at the time the first action was filed. "[A] judgment is not res judicata as to rights which were not in existence and which could not have been litigated at the time the prior judgment was entered." *See Wagner v. Baron*, 64 So.2d 267, 268 (Fla. 1953) (citations omitted). For res judicata purposes, two causes of action are the same if both suits are grounded on the same essential facts. *See Albrecht*, 444 So.2d at 12. Although the two actions involve the same development agreement, they involve distinct causes of action provable by different facts. Consequently, res judicata is not applicable.

Although the district court's order granting summary judgment in favor of Hooters is couched in terms of res judicata, the court's analysis appears to be based in part

on the doctrine of judicial estoppel. Likewise, Hooter's principal argument in its brief is based on judicial estoppel grounds. Judicial estoppel requires: (1) a party plead inconsistent positions; (2) that the previous position be "successfully maintained"; and (3) that the adverse party who acquiesced in the former position be prejudiced by the inconsistency. *See Dunne v. Somoano*, 550 So.2d 5, 7 (Fla. 3d DCA 1989). Whether Carolina Wings took inconsistent positions by seeking damages for Gwinnett, Harborplace, and St. Louis I in the first action and later seeking damages for St. Louis II, Myrtle Beach II, and Greensboro is debatable. Based on the state court's interpretation of the agreement, Carolina Wings has the right to pick and choose its favorite restaurants until it finally secures participation or judgment as to six. Assuming these positions are inconsistent, however, Hooters' argument fails because Carolina Wings did not successfully maintain its position in the first action. As recognized by the First District Court of appeal, Carolina Wings only pled breach with regard to Charlotte II. Consequently, the court reversed the order awarding damages as to the other three restaurants. Therefore, Carolina Wings is not judicially estopped from bringing the second action.

B. Hooters' Cross-Appeal

On cross-appeal, Hooters claims that the district court erred in granting partial summary judgment to Carolina Wings on the grounds of collateral estoppel. Specifically, Hooters contends that, provided Carolina Wings' second suit is not entirely barred, Hooters is not collaterally estopped from litigating the meaning of key contractual language in the agreement. We likewise

review *de novo* a grant of partial summary judgment based on collateral estoppel grounds. *See Matter of McWhorter*, 887 F.2d 1564, 1566 (11th Cir. 1989). Further, the issue-preclusion law of Florida guides our determination of this issue.

The federal standard for applying collateral estoppel accords with the legal standard under Florida law. *See Mike Smith Pontiac, GMC, Inc. v. Mercedes-Benz of No. America, Inc.*, 32 F.3d 528, 532 (11th Cir. 1994). This circuit has established three prerequisites to the application of collateral estoppel: (1) the issues must be identical; (2) the issue in the prior action must have actually been litigated; and (3) the prior determination of the issue must have been a necessary and critical part of the judgment. *See id.*

The first condition is satisfied because the issue in the first action, namely, whether the development agreement obliges Hooters to merely offer participation in restaurants until six have been offered, or until Carolina Wings accepts participation in six, is the same as the issue raised in the second suit. As to this issue, the state court in the first action concluded that Hooters was obliged to offer Carolina Wings the opportunity to participate in the ownership of restaurants developed by Hooters *until* Carolina Wings accepts and participates in the ownership of six restaurants. Although Carolina Wings received damages pursuant to a default judgment, under Florida law a default judgment is as conclusive on the rights of the parties as any other judgment on the merits. *See Martino v. Florida Ins. Guaranty Ass'n*, 383 So.2d 942, 944 (Fla. 3d DCA 1980). Thus, the second element is satisfied. Lastly, the district court correctly concluded that the contract's interpretation was necessary to the judgment in the first

action in that it was essential to the trial court's award of damages in favor of Carolina Wings for not being offered participation in the Charlotte II restaurant. For these reasons, Hooters is now precluded from litigating this issue in the instant action.

III. CONCLUSION

For the foregoing reasons, we reverse the district court's grant of summary judgment in favor of Hooters on res judicata grounds and remand for further proceedings consistent with this opinion. We affirm the grant of partial summary judgment in favor of Carolina Wings on collateral estoppel grounds.

REVERSED AND REMANDED IN PART; AFFIRMED IN PART.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

CAROLINA WINGS, INC.,
a Florida corporation,

Plaintiff,

v.

HOOTERS OF AMERICA, INC.,

Defendant.
_____/

Case No.
95-870-Civ-J-99(H)

(Filed
Oct. 4. 1996)

ORDER ON MOTIONS FOR SUMMARY JUDGMENT

This cause is before the Court on three motions for summary judgment. On January 23, 1996, Plaintiff filed a Motion for Partial Summary Judgment (Doc. #25), to which Defendant filed a response in opposition on February 20, 1996 (Doc. #32). Then, on March 5, 1996, Defendant filed its First Motion for Summary Judgment (Doc. #34). Plaintiff filed its response on April 1, 1996 (Doc. #46). Thereafter, on July 29, 1996, Defendant filed its Second Motion for Summary Judgment (Doc. #62) and Plaintiff filed a response in opposition on August 16, 1996 (Doc. #74).

The Court entertained oral argument on August 26, 1996, and upon due consideration of the motions and memoranda, as well as the pleadings, affidavits, depositions, answers to interrogatories and admissions on file, the Court finds that there is no genuine issue of material fact and that: 1) Plaintiff's Motion for Partial Summary Judgment should be granted; 2) Defendant's First Motion for Summary Judgment should also be granted; and 3)

Defendant's Second Motion for Summary Judgment should be denied as moot.

I. Background Facts

Plaintiff Carolina Wings, Inc. ("Carolina Wings") filed its Amended Complaint in this action against Defendant Hooters of America, Inc. ("Hooters") on August 17, 1995, seeking damages for breach of contract. The action was filed in the Circuit Court, Fourth Judicial Circuit, in and for Duval County, Florida. On September 1, 1995, Hooters removed the matter to this Court, based upon diversity jurisdiction pursuant to 28 U.S.C. §§ 1332 and 1441 *et seq.*

In 1988, Carolina Wings and Hooters entered into a Development Agreement in which Carolina Wings purchased the right of first refusal to participate in the ownership of up to six Hooters' restaurants anywhere in the United States except for certain defined geographic areas previously made the subject of similar agreements with other partners. Pursuant to this agreement, Carolina Wings and Hooters developed two restaurants in North Carolina. One was opened in Raleigh in 1988 and the other in Charlotte ("Charlotte I") in 1989. Then, in 1990 and 1991, Carolina Wings denied four subsequent offers from Hooters to participate in other restaurants. In September 1991, Hooters opened another restaurant in Charlotte ("Charlotte II"), but did not offer Carolina Wings the opportunity to participate in that venture. Hooters apparently took the position then, as it does now, that it was only obligated under the Development Agreement to offer first refusal right to Carolina Wings with respect to a

total of six restaurants; and having met that obligation, Hooters viewed the contract as fully performed. Carolina Wings took the position, however, that it had first refusal rights on a continuing basis until such time as it had actually accepted participation in the ownership of a total of six restaurants, not merely the right to expect an offer of six restaurants.

Carolina Wings therefore considered Hooters' decision to open Charlotte II, without offering it participation, a breach of the Development Agreement. Thus, Carolina Wings filed an action ("the first action") against Hooters in the state court in Jacksonville on May 14, 1992. In that action a default was entered against Hooters because it failed to respond to the complaint. The case was set for a pretrial conference on October 9, 1992, and a trial on damages on October 15, 1992. Though given notice, Hooters did not appear at the pretrial conference or the trial.

In the complaint, Carolina Wings had alleged that Hooters failed to offer participation in Charlotte II, but did not include any alleged failure to extend offers of participation in other restaurants that had also been developed by Hooters. During the trial, however, Kent Schmidt, vice president and secretary-treasurer of Carolina Wings, testified directly and without equivocation that Carolina Wings would have accepted the right of first refusal to four stores – Charlotte II, St. Louis I, Baltimore, and Gwinnett – if Hooters had extended offers to participate in those restaurants, and damages were sought with respect to the lost opportunity to participate in all four stores. After the trial, the state court entered findings of fact and conclusions of law and awarded a

final judgment of $5,432,565 for not offering Carolina Wings participation in Charlotte II as well as the three other restaurants.

After this judgment was entered, Hooters appeared in the action and filed a timely motion for rehearing attempting to set aside the default and to vacate the final judgment. After an evidentiary hearing, the trial court denied Hooters' motion and Hooters appealed. The Florida First District Court of Appeal affirmed the trial court's refusal to vacate the default and also affirmed the judgment to extent that it awarded damages for Charlotte II, but reversed and vacated the judgment to the extent it awarded damages related to the St. Louis I, Baltimore and Gwinnett restaurants. *Hooters of America, Inc. v. Carolina Wings*, 655 So.2d 1231, 1235 (Fla. 1st DCA 1995). The District Court of Appeal reached this conclusion because the complaint sought damages for a single store, Charlotte II, and did not contain any mention or reference to the restaurants located at St. Louis, Baltimore, or Gwinnett. *Id.* at 1234. Thus, the appellate court held that the judgment concerning the other three restaurants, entered pursuant to a default, violated Hooters' rights of due process. *Id.* Subsequent to the mandate of the court of appeal, the trial court issued an amended final judgment awarding Carolina Wings $1, 580,873 for Charlotte II, and that judgment was paid. No effort was made by Carolina Wings to amend its pleadings after the remand in order to seek reentry of the judgment it had previously obtained.

Approximately two months after the appellate court issued its opinion in the first action, Carolina Wings then filed this action in state court. In Count I of the Amended Complaint, Carolina Wings seeks a declaratory judgment

that Hooters is contractually obligated to offer Carolina Wings participation in restaurants developed by Hooters until Carolina Wings has accepted participation in a total of six Hooters' restaurants. In Counts II through IV, Carolina Wings alleges that Hooters breached the Development Agreement by not offering it participation in three restaurants – St. Louis II, Myrtle Beach II, and Greensboro – which are three restaurants other than the three stores for which damages had been sought in the first action. Carolina Wings then filed its Motion for Partial Summary Judgment on Count I of the Amended Complaint. Hooters responded by filing its Motions for Summary Judgment.

II. Standard of Review

Summary judgment is proper where, upon motion of a party, "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED.R.CIV.P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247, 106 S.Ct. 2505, 2509-10 (1986). *See also Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 585-86, 106 S.Ct. 1348, 1355-56 (1986). In making this determination, the Court must view all of the evidence in a light most favorable to the party opposing the motion and all justifiable inferences are to be drawn in favor of the nonmoving party. *Eastman Kodak Co. v. Image Technical Serv., Inc.*, 112 S.Ct. 2072, 2077 (1992); *Anderson*, 477 U.S. at 255, 106 S.Ct. at 2413; *Matsushita Elec. Indus. Co.*, 475 U.S. at

587-88, 106 S.Ct. at 1356. Still, the party opposing summary judgment must "go beyond the pleadings and by her own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.' " *Id.*, 106 S.Ct. at 2553. The court shall then grant summary judgment only "if there is no genuine issue as to any material fact and if the moving party is entitled to judgment as a matter of law." *Anderson*, 477 U.S. at 250, 106 S.Ct. at 2511. The question for the court is "not whether there is literally no evidence, but whether there is any upon which a jury could properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed." *Id.* at 251, 106 S.Ct. at 2511 (citation omitted).

Further, the Court may enter summary judgment against the nonmoving party if he or she "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex*, 477 U.S. at 322, 106 S.Ct. at 2552. Failure to establish an essential element necessarily renders all other facts immaterial, leading to the conclusion that there is no genuine issue of material fact. *Id.* at 323, 106 S.Ct. at 2552. The moving party is then entitled to judgment as a matter of law because the opposing party has failed to establish an essential element with respect to which he or she has the burden of proof. *Id.*, 106 S.Ct. at 2553.

III. Discussion

Interestingly, both parties in their summary judgment motions assert the doctrine of res judicata against each other. Carolina Wings contends it is entitled to partial summary judgment on Count I of the Amended Complaint (the claim for declaratory judgment) because the parties' rights under the Development Agreement have already been determined by the litigation in the first action. Hooters' Motion for Summary Judgment argues that Carolina Wings is barred from bringing this action by the rule against splitting causes of action and res judicata, i.e., that the Plaintiff's present cause of action could and should have been litigated in the first action. Both parties are right.

A. Carolina Wings' Motion for Partial Summary Judgment

In its motion, Carolina Wings argues it is entitled to partial summary judgment on Count I of the Amended Complaint, in which it seeks a declaratory judgment as to the rights of the parties under the Development Agreement. Carolina Wings argues that res judicata supports its motion because the rights of the parties, under the agreement, have been determined in the first action. It contends that the state trial court expressly found that the Development Agreement required Hooters to continue to offer Carolina Wings participation in restaurants until Carolina Wings accepted a total of six restaurants. It further contends that Florida's First District Court of Appeal affirmed that finding. It notes that this finding was necessary to the decision, and was not *dicta*, because

it enabled the trial court to conclude that Carolina Wings was entitled to damages for not being offered participation in the Charlotte II Hooters, even though Carolina Wings had been offered participation in six other restaurants.

Under Florida law, res judicata bars parties from bringing actions which raise issues that have already been adjudicated in a previous action between the same parties or their privies.[1] *Meshulam v. General Motors Corp.*, 995 F.2d 192, 194 (11th Cir. 1993). The party invoking res judicata must establish: 1) identity of the thing sued for; 2) identity of the cause of action; 3) identity of the parties; and 4) identity of the quality of the person for or against whom the claim is made. *Caron v. Systematic Air Services*, 576 So.2d 372, 375 (Fla. 1st DCA 1991) (citing *Donahue v. Davis*, 68 So.2d 163, 169 (Fla. 1953)). Further, when the second suit is between the same parties but upon a different cause of action from the first, the prior judgment will not serve as an estoppel except as to those issues actually litigated and determined in it. *Caron*, 576 So.2d at 375 (citing *Gordon v. Gordon*, 59 So.2d 40 (Fla.), *cert. denied*, 344 U.S. 878, 73 S.Ct. 165 (1952)).

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[1] In its Hooters' motion, it argues that Georgia law controls this action, noting that the Development Agreement provides that disputes regarding its meaning shall be governed according to Georgia law. Nevertheless, Hooters notes that Georgia law mirrors Florida law on res judicata. Accordingly, the Court, for the purposes of the summary judgment motions, will not make a specific ruling on whether Georgia or Florida law should govern.

Under this framework, the Court finds that res judicata applies to the state court's adjudication of the meaning of the Development Agreement between Carolina Wings and Hooters, therefore precluding further litigation on that issue. In the first action, the state court found that Hooters was obligated to offer Carolina Wings the opportunity to participate in the ownership of restaurants developed by Hooters until Carolina Wings accepts and participates in the ownership of six Hooters restaurants. As Carolina Wings noted, this finding was essential to the judgment for damages as to the Charlotte II restaurant because prior to the development of Charlotte II, Hooters had extended six offers of participation to Carolina Wings. Thus, the meaning of the Development Agreement had already been litigated in the first action, foreclosing the relitigation of that issue in this suit. Furthermore, although Carolina Wings received damages pursuant to a default judgment, that judgment is as conclusive on the rights of the parties as any other judgment on the merits. *Martino v. Florida Ins. Guaranty Ass'n*, 383 So.2d 942, 943 (Fla. 3d DCA 1980); *Cabinet Craft v. A.G. Spanos Enterprises, Inc.*, 348 So.2d 920, 922 (Fla. 2d DCA 1977).

Hooters contends that the First District Court of Appeal's discussion of the meaning of the Development Agreement is dicta. Relying on the principal that dicta cannot serve as the basis for collateral estoppel or res judicata, Hooters contends that the meaning of the Development Agreement, as determined in the first action, is not res judicata to the parties in the present action. The Court is not persuaded by that argument. The meaning of

the Development Agreement was an issue that was actually litigated in the first action. *See Caron*, 576 So.2d at 375. As previously noted, the determination of the meaning of the Development Agreement was essential to the trial court's award of damages in favor of Carolina Wings. The meaning of the Development Agreement was also considered by the First District Court of Appeal. Before the appellate court, Hooters argued that the "complaint so conflicted with the plain language of the Agreement . . . that [it] failed to state a cause of action." *Hooters*, 655 So.2d at 1233. Further, Hooters maintained then, as it does now, that it fully performed its obligation under the Development Agreement because it already had offered Carolina Wings first refusal rights to six restaurants. Nonetheless, the Court of Appeal rejected that argument, concluding that "the Agreement was sufficiently ambiguous as to render the issue a question of fact rather than a question of law." *Id.* (citation omitted). Thus, the meaning of the Development Agreement was actually litigated by the trial and appellate courts. Further, the meaning of the Development Agreement was necessary to the subsequent judgment in the initial action and the relitigation of its meaning is precluded by res judicata.

Carolina Wings is entitled to partial summary judgment insofar as it seeks a declaratory judgment on the meaning of the Development Agreement. The Court also finds – as will be explained below – that Carolina Wings is not entitled to recover damages on three additional restaurants.

B. Hooters' Motion for Summary Judgment

The Court will now consider Hooters' First Motion for Summary Judgment, in which it also argues for the application of res judicata as a complete bar to the Plaintiff's suit. Hooters contends that the dispute raised in this case was, or could and should have been, resolved in the first action. It argues that all of Carolina Wings' asserted rights under the Development Agreement, including its asserted cause of action for breach of contract, had fully accrued by the time it filed suit in the first action, and that all of its claims could and should have been made in that action.

In response, Carolina Wings contends that Hooters' arguments are based on the erroneous assumption that it is suing for damages relating to the St. Louis I, Baltimore, and Gwinnett restaurants. Nothing that it is now seeking damages for the St. Louis II, Myrtle Beach II, and Greensboro restaurants, Carolina Wings contends that this suit involves a "different cause of action" than the first action. Carolina Wings further notes that the restaurants that are the subject of the current action were developed after the commencement of the first action. It also argues that the breach as to each restaurant is separate and distinct; therefore, the doctrine of res judicata does not apply.

As previously noted, res judicata bars parties from bringing actions raising issues that have already been adjudicated in a previous action between the same parties or their privies. *Meshulam v. General Motors Corp.*, 995 F.2d 192, 194 (11th Cir. 1993). The doctrine of res judicata also contemplates that where the suit is upon the same cause

of action and between the same parties, the first judgment is conclusive as to all matters which were or could have been determined. *Albrecht v. State*, 444 So.2d 8, 12 (Fla. 1984) (citations omitted). This supports the principle that a final judgment by a court of competent jurisdiction is absolute and puts to rest every justiciable issue, as well as every issue actually litigated. *Id.* at 11.

The Court agrees with Hooters and finds that the second lawsuit (this action) is barred by res judicata. Under the Development Agreement, Carolina Wings had the right to participate in up to six Hooters' restaurants. Carolina Wings accepted participation in two restaurants, rejected others, and then initiated the first action seeking damages relating to the Charlotte II Hooters. During the trial of the first action, Mr. Schmidt, vice president and secretary-treasurer of Carolina Wings, testified that Carolina Wings would have accepted the right of first refusal of three additional stores as well – St. Louis I, Baltimore, and Gwinnett – and damages were sought (and actually awarded in the trial court) with respect to each of those four stores. Clearly, therefore, Carolina Wings' cause of action for breach of contract – and the measure of its damages for that breach as keyed to those four stores – was fully mature and actionable at the time of the first suit. Indeed, Carolina Wings actually litigated that claim – successfully so in the trial court – but failed to prevail on appeal only because the judgment as to liability was based upon a default and its complaint had not given sufficient notice of the full measure of the damages being sought. Even then, however, Carolina Wings could have cured that defect by seeking to amend its pleadings following the remand from the state appellate court, but

chose not to do so and accepted a reduced judgment instead.[2]

Carolina Wings stresses in its arguments that the present suit is grounded upon and presents a separate "cause of action" because the Plaintiff now seeks damages resulting from its inability to participate in the development of three new or additional stores, different from the three additional stores it sought to utilize in the trial court as a measure of its damages in the first action. It takes the position that each time Hooters now decides to develop a new restaurant, it breaches its contract with Carolina Wings by not offering to it the opportunity to participate; and consequently, Carolina Wings – according to its view – is free to pick and choose which restaurant or restaurants it would like to invest in or, more accurately in view of the parties' present relationship, to pick and choose those restaurants it would like to utilize as a measure of its damages. Thus, according to that position, if Hooters should decide next week or next month to open a new store or stores, nothing would prevent Carolina Wings from abandoning its present

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[2] During oral argument concerning the motions for summary judgment, counsel for Carolina Wings conceded that leave to amend could have been obtained, but counsel then emphasized that there was nothing in the governing Florida Rules of Procedure that required such an amendment. This is no doubt true insofar as the rules of procedure are concerned, but it overlooks the doctrine of res judicata itself; that doctrine operates to preclude relitigation not only with respect to issues that *were* previously presented, but also those that *could* have been presented within the framework of the previous action.

reliance upon St. Louis II, Myrtle Beach II and Greensboro, and to rely instead upon one or more of the newer stores in calculating its damages. Only when Carolina Wings has finally received a judgment in this action awarding damages to it for three specifically identified stores of its selection will its right to thus pick and choose be brought to an end.

The Court concludes, however, that the Carolina Wings' position constitutes an excessively broad view of its "cause of action" for purposes of resolving the res judicata defense. The Court is persuaded, instead, that the decision in *Petromanagement Corp. v. Acme-Thomas Joint Venture*, 835 F.2d 1329 (10th Cir. 1988), represents a well reasoned statement of the governing law and is dispositive of this case. On remarkably similar facts, yet facts that were far more favorable to the position of the Plaintiff than those in this case, the Tenth Circuit applied res judicata and foreclosed further litigation. The court held:

> Under the doctrine of res judicata or claim preclusion, " 'a final judgment on the merits bars further claims by parties or their privies based on the same cause of action.' " *Brown v. Felsen*, 442 U.S. 127, 131, 99 S.Ct. 2205, 2209 (1979) (quoting *Montana v. United States*, 440 U.S. 147, 153, 99 S.Ct. 970, 973 (1979)). Determining what constitutes a single "cause of action" has long been a troublesome question. *See* IB J. Moore, J. Lucas & T. Currier, *Moore's Federal Practice* ¶ 0.410[1] at 350 (1984). In making this determination we adopt the transactional approach of the *Restatement (Second) of Judgments* [§ 24]:

> (1) When a valid and final judgment rendered in an action extinguishes the plaintiff's claim pursuant to the rules of merger or bar (see §§ 18, 19), the claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose. . . .
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> . . . Under this approach, a "contract" is generally considered to be a "transaction," so that all claims of contractual breach not brought in an original action would be subject to bar of claim preclusion so long as the breaches antedated the original action. *See Restatement of Judgment* § 62 comment h at 250 (1942) ("All the breaches of contract prior to the commencement of the suit are treated as a single cause of action."); *Prospero Associates v. Burroughs Corp.*, 714 F.2d 1022, 1027-28 (10th Cir. 1983).

Petromanagement Corp., 835 F.2d at 1335-36.

Here, as previously pointed out, at the time the first action was initiated there were four stores that the Plaintiff would have accepted under the contract in addition to the two in which it had already invested. The breach of the entire contract was therefore full, complete and mature, and a "cause of action" for that breach of the contract as a whole could have been prosecuted in that action as, indeed, the Plaintiff attempted but then abandoned. It follows that the Plaintiff's entire "cause of action" for a breach – any breach – of the contract between the parties has been adjudicated and that this action is precluded by res judicata.

Accordingly, it is now

ORDERED AND ADJUDGED:

1. That Plaintiff's Motion for Partial Summary Judgment, filed January 23, 1996 (Doc. #25), is hereby **GRANTED**;

2. That Defendant's First Motion for Summary Judgment, filed March 5, 1996 (Doc. #32), is hereby **GRANTED**;

3. That the Clerk is hereby directed to enter judgment in favor of Defendant Hooters and against Plaintiff Carolina Wings;

4. That all other motions pending in this action are moot.

DONE AND ORDERED in Chambers Jacksonville, Florida, this 3rd day of October, 1996.

/s/ Wm. Terrell Hodges
UNITED STATES
DISTRICT JUDGE

Copies to:
All parties of record

HOOTERS OF AMERICA, INC., Hooters of Raleigh, Inc., and Hooters of Charlotte, Inc., Appellants,

v.

CAROLINA WINGS, INC., and Charlotte Wings, Inc., Appellees.

No. 93-1759.

District Court of Appeal of Florida, First District.

May 25, 1995.

Rehearing Denied June 29, 1995.

Robert P. Smith and Karen M. Peterson, Hopping, Boyd, Green & Sams, Tallahassee, for appellants.

Stephen D. Busey and Richard R. Thames, Smith, Hulsey & Busey, Jacksonville, for appellees.

LAWRENCE, Judge.

Hooters of America, Inc. (Hooters) appeals a final judgment for damages in the amount of $5,432,565, entered against it and in favor of Carolina Wings, Inc. (Carolina) pursuant to a default. We reverse in part and affirm in part.

Hooters and Carolina entered into a "Development Agreement" (Agreement) in 1988, whereby Carolina purchased "the right of first refusal to participate in the ownership of up to six (6) Hooters' System Restaurants" anywhere in the United States, except for certain defined geographic areas previously the subject of similar agreements with other partners. Hooters and Carolina opened two restaurants pursuant to the Agreement; one was

located in Raleigh and the other in Charlotte (Charlotte I). Hooters offered Carolina an opportunity in 1990 and 1991, pursuant to the Agreement, to participate in four additional restaurants: Wilmington, North Carolina; Norcross, Georgia; and Columbia and Myrtle Beach, South Carolina. Carolina rejected these sites as inferior markets. From 1990 through 1992, Hooters opened, without joint venture partners, sixteen restaurants at various locations, including the four rejected by Carolina.

Hooters opened a second restaurant in Charlotte (Charlotte II) in September 1991, located less than seven miles from Charlotte I. Carolina was not offered an opportunity to participate in Charlotte II. Carolina viewed this as a breach of the Agreement and settlement negotiations ensued. Carolina filed suit in May 1992, when negotiations proved unsuccessful.

Carolina's complaint alleged in Count I that Hooters breached the Agreement by failing to offer participation in Charlotte II, when Carolina, at that point, had accepted participation in only two of the six restaurants provided for in the Agreement. Count II alleged that Hooters had breached a covenant not to compete contained in the Agreement, by opening Charlotte II within fifteen miles of Charlotte I.

Hooters and its counsel at that time failed to respond in any manner to the complaint. A default was entered. Hooters was subsequently furnished with an order setting the case for pretrial conference and for non-jury trial on the issue of damages. Again, Hooters failed to appear for the pretrial conference and the non-jury trial. Hooters also failed to respond to or participate in discovery

requests and proceedings, including the deposition of its former president who was instrumental in negotiating the Agreement.

The trial court awarded Carolina damages in the total amount of $5,432,565, allocated as follows:

a) Charlotte II – $1,205,022;[1]

b) Harborplace – 1,770,321;

c) St. Louis – 1,546,973;

d) Gwinnett – 910,249.

Hooters first appeared in the action within eleven days following entry of the final judgment, by employing Jacksonville counsel for the first time, who filed a timely motion for rehearing and a motion seeking to set aside the default and to vacate the final judgment. The trial court denied both motions following a hearing.

Hooters argues several theories upon which it contends that the trial court committed error. Hooters first claims excusable neglect for its failure to respond prior to the entry of a default. We will not burden the record by reciting the events which resulted in the entry of a default and an award of damages following the non-jury trial. Suffice it to say that it is clear that the trial judge was eminently correct in concluding that Hooters' conduct constituted gross negligence.

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[1] This amount includes $179,644 for breach of a covenant not to compete under Count II, alleging that Charlotte II unfairly competed with Charlotte I. Count III alleged the breach of a fiduciary duty, but the damages requested were duplicative of Count II.

Hooters also contends error in the entry of a default because it was entitled to notice of the application for default. We conclude that the trial judge correctly determined that Hooters was not entitled to notice of the application for default pursuant to Rule 1.500(b), Florida Rules of Civil Procedure.

Hooters argues three additional grounds for relief, beyond the issue of whether a default was properly entered, which we restate and address as follows: (1) that Carolina so abused and misused the pleading and default process that the only remedy is to vacate the judgment and begin the entire process anew; (2) that Carolina was not entitled to a judgment for damages because the complaint failed to state a cause of action, in that the Agreement on its face contradicted the allegations in the complaint; and (3) that even if Count I stated a cause of action, the damages awarded were beyond the allegations pleaded in the complaint.[2]

As to the first ground, we are not persuaded that Carolina has so abused and misused the pleading and default process that the entire process should be set aside and begun anew. With respect to the second and third grounds, Carolina concedes that each ground involves a separate and distinct principle of law. Although similar in nature, failure to state a cause of action is not the same as recovering damages on a cause of action not pleaded at all. Hooters argues that the allegations in the complaint so conflicted with the plain language of the Agreement, which was incorporated by reference, that the complaint

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[2] This issue was raised for the first time on appeal.

failed to state a cause of action for breach of contract. We agree with the trial judge who admitted extrinsic evidence on the subject, that the Agreement is sufficiently ambiguous as to render the issue a question of fact rather than a question of law. *Neumann v. Brigman*, 475 So.2d 1247 (Fla. 2d DCA 1985).

We do find merit however, in Hooters' third ground, as it relates to Count I, that damages may not be awarded which are not supported by the allegations contained in the complaint. An elementary principle of law provides that a party against whom a default has been properly entered admits the truth of the well-pleaded allegations of the complaint as to liability. It is also elementary that damages will be awarded only to the extent supported by the well-pleaded allegations of the complaint. A party may rely upon these principles. Henry P. Trawick, Jr., *Florida Practice and Procedure* § 25-4, at 381 (1994). This court in *Freeman v. Freeman*, 447 So.2d 963, 964 (1st DCA 1984) held:

> A defendant against whom a default is entered admits only the well-pleaded facts and acquiesces only in the relief specifically prayed for. The award of relief not sought by the pleadings is error.

(Citation omitted.) To like effect are decisions in *Tutwiler Cadillac, Inc. v. Brockett*, 551 So.2d 1270 (1st DCA 1989); *Board of Regents v. Stinson-Head, Inc.*, 504 So.2d 1374 (Fla. 4th DCA 1987); *Bay Products Corp. v. Winters*, 341 So.2d 240 (Fla. 3d DCA 1976); see also *Alan Neuman Productions, Inc. v. Albright*, 862 F.2d 1388 (9th Cir.1988).

Carolina does not take issue with this principle of law. Rather, it argues that its pleading is adequate to support the award of damages for all four of the restaurants involved. We therefore address the adequacy of Count I of Carolina's complaint, the pertinent provisions of which are recited as follows:

> 5. On August 29, 1988, Hooters and Carolina Wings entered into a Development Agreement (the "Development Agreement") by which, in consideration for Carolina Wings' payment of $50,000, Hooters granted to Carolina Wings "the right of first refusal to participate in the ownership of up to six (6) Hooters' System Restaurants." A copy of the Development Agreement is attached as Exhibit A.
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> . . . .
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> 11. Pursuant to Paragraph 1 of the Development Agreement, Hooters is contractually obligated to offer to Carolina Wings a right of first refusal to participate in the ownership of up to six Hooters restaurants.
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> 12. In accordance with this contractual obligation, Hooters has offered to Carolina Wings and Carolina Wings has accepted the opportunity to participate in the development and ownership of two restaurants, the First Charlotte Hooters and the Raleigh Hooters.
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> 13. Subsequently, however, Hooters developed and operates, through its wholly owned subsidiary Hooters of Charlotte II, Inc., a competing Hooters restaurant in Charlotte, North Carolina (the "Second Charlotte Hooters") without offering to Carolina Wings the right to participate in its ownership.

14. Hooters' failure to offer to Carolina Wings the opportunity to joint venture with it in the ownership of the Second Charlotte Hooters constitutes a breach of the Development Agreement.

15. Carolina Wings is willing, ready and able to participate in the ownership and operation of the Second Charlotte Hooters.

. . . .

18. Carolina Wings has been damaged by Hooters' breach of the Development Agreement in an amount exceeding $10,000.

The entire count is void of any mention or reference to the Hooters restaurants located at Harborplace, Gwinnett, or St. Louis. A single breach (Charlotte II) is alleged, and damages are claimed, founded only upon the same single breach. A fair and objective reading of Count I leads to the conclusion that the only restaurant at issue was Charlotte II. It follows that the only damages sought and allowable were those resulting from Hooters' alleged failure to permit Carolina's participation in Charlotte II. Because Carolina had the right to participate in only four additional restaurants (even under their view of the contract provisions), Hooters would have been required to guess as to the identity of the four additional restaurants, since Hooters opened an additional sixteen restaurants during this time, four of which were rejected by Carolina. Even then, for Carolina to have been entitled to damages under any circumstance, it would have had to affirmatively elect to participate in the four additional restaurants as a predicate to claiming a breach of the agreement. This necessary allegation is absent from the

complaint. We thus conclude that Count I could support an award of damages for lost profits solely in connection with Charlotte II. Because Count I did not even purport to involve the restaurants at Harborplace, St. Louis, and Gwinnett, the final judgment awarding damages in this respect constituted a violation of Hooters' due process rights inherent in the elementary principle of law heretofore recited.

Carolina also contends that because Hooters failed to raise this issue before the trial court in its motions for rehearing and to set aside the default, it should be precluded from raising it for the first time on appeal, citing *Abrams v. Paul*, 453 So.2d 826 (1st DCA 1984). Abrams did not involve the issue of an award of damages beyond the pleadings. Rather, it was contended for the first time on appeal that the complaint failed to state a cause of action. No argument was made that the error was fundamental or jurisdictional. We find *Abrams* applicable, as it relates to the instant case and Hooters' due process claim, only for the generally accepted proposition that an issue may not be argued for the first time on appeal. However, the *Abrams* court also pointed out a well-recognized exception to the general rule:

> [I]n the absence of jurisdictional or fundamental error, it is axiomatic that it is the function of the appellate court to review errors allegedly committed by trial courts, not to entertain for the first time on appeal issues which the complaining party could have, and should have, but did not, present to the trial court.

Abrams, 453 So.2d at 827.

Thus, the question to be resolved is whether Hooters' due process claim is fundamental. Our supreme court, in *Sanford v. Rubin*, 237 So.2d 134, 137 (Fla.1970), said: " 'Fundamental error,' which can be considered on appeal without objection in the lower court, is error which goes to the foundation of the case or goes to the merits of the cause of action." In analyzing further the issue of fundamental error, our supreme court said:

> This Court has indicated that for error to be so fundamental that it may be urged on appeal, though not properly presented below, the error must amount to a denial of due process.
>
> . . . .
>
> We agree with [the] observation that the doctrine of fundamental error should be applied only in the rare cases where a jurisdictional error appears or where the interests of justice present a compelling demand for its application.

Ray v. State, 403 So.2d 956, 960 (Fla.1981) (citations omitted).

Our sister court further interpreted the holding in *Sanford* as follows:

> The clearest teaching in *Sanford* is, thus, that it is an extremely rare exception to the usual rule of waiver of issues not argued below and is probably reserved only for the exceedingly unusual case where a substantial injustice would be otherwise perpetrated.

Moorman v. American Safety Equipment, 594 So.2d 795, 800 (Fla. 4th DCA 1992).

Adequate notice is a fundamental element of the right to due process. A litigant may choose to suffer a default, for whatever reason, and suffer the consequences. However, the litigant should be entitled to anticipate the consequences that reasonably flow from the allegations of the complaint. In the instant case, Hooters was on notice that upon default it would suffer damages only from its failure to offer Carolina an opportunity to participate in the ownership of Charlotte II. Any new admittee to the Bar who engages in civil trial practice learns quickly from his or her peers, or upon the first appearance before the trial court for entry of a judgment following default, that "you cannot get more than you asked for in the complaint". In the instant case, Carolina got $4,227,543 more than it asked for in the complaint. The matter of Harborplace, St. Louis and Gwinnett was not only absent from the complaint, but likewise was not recited in the findings of fact and conclusions of law, nor the final judgment entered by the trial court. We do not suggest that the trial court was required to make reference to the three restaurants in its rulings, but note that these circumstances support Hooters' contention that it did not raise the issue before the trial court because it was not aware that damages had been awarded for the three restaurants until preparation for this appeal had begun.

We hold that the award of damages for lost profits in connection with restaurants at Harborplace, St. Louis, and Gwinnett meets the test of fundamental error because the complaint failed to give notice that these restaurants were at issue. It should therefore be held only to suffer the consequences of a judgment for $1,205,022,

related to Charlotte II, not $5,432,565, an amount which included all four restaurants.

For the reasons stated, we AFFIRM the judgment of the trial court to the extent that it awards damages for Charlotte II, but REVERSE and vacate the default and final judgment as it relates to Harborplace, St. Louis, and Gwinnett; and remand for proceedings consistent with this opinion.

BENTON, J., concurs.

ALLEN, J., concurs in part and dissents in part.

ALLEN, Judge, concurring in part and dissenting in part.

I would affirm the judgment and the post-judgment order because no error warranting reversal has been demonstrated. Because the argument was not presented to the trial court, I would not reach the appellant's contention that the judgment awards damages that were not pleaded. However, I would certify conflict with *Cabral v. Diversified Servs., Inc.*, 560 So.2d 246 (Fla. 3d DCA 1990), as to this issue.

For the first time, the appellant now contends through new counsel that the trial court violated the appellant's due process rights by awarding damages for alleged breaches which were not pleaded by the appellee. This argument might have been presented to the trial court pursuant to a motion under Rule 1.540(b) at any time up to a full year following entry of the judgment. In fact, the appellant moved for relief under Rule 1.540(b), but this argument was never presented.

As indicated by the majority, a default judgment may only award such relief as is supported by the complaint. *See Freeman v. Freeman*, 447 So.2d 963 (Fla. 1st DCA 1984); *Bay Products Corp. v. Winters*, 341 So.2d 240 (Fla. 3d DCA 1976). But, as also recognized by the majority, in the absence of fundamental or jurisdictional error, we will not entertain an argument which should have been, but was not, presented to the trial court. *Abrams v. Paul*, 453 So.2d 826, 827 (Fla. 1st DCA 1984). In light of our decision in *Abrams*, I am unable to agree with the majority that the trial court committed fundamental error.

In *Abrams*, it was argued on appeal that the trial court had committed error in entering a default judgment upon a complaint which failed to state a cause of action. Considering the alleged error to be neither fundamental nor jurisdictional, we refused to consider the argument because it had not been presented to the trial court.

The majority apparently concludes, however, that the purported error here, allowing proof of damages beyond the allegations of a well-pleaded complaint, is somehow more egregious, and therefore more fundamental, than allowing proof of damages where a complaint completely fails to state any colorable claim whatsoever. I am unable to agree with this conclusion. Indeed, it seems apparent to me that an assertion that pleadings are insufficient to support an award of certain damages is nothing more or less than an argument that the complaint fails to state a cause of action (a legally recognized factual basis) upon which those damages might be awarded. I therefore believe this case to be controlled by *Abrams*.

Although I believe we are bound by our decision in *Abrams*, I recognize that it expresses the minority view with respect to appellate challenges to the sufficiency of a complaint where the argument has not been presented to the trial court. While a few cases such as *United States v. One 1979 Rolls-Royce Corniche Convertible*, 770 F.2d 713 (7th Cir.1985), and *Katz v. Pierce*, 732 P.2d 92 (Utah 1986), are in agreement with Abrams, the majority view appears to accord with the ruling in *Cabral* that the sufficiency of the pleadings to support a default judgment may be challenged for the first time on appeal. *See e.g., Fehlhaber v. Fehlhaber*, 681 F.2d 1015 (5th Cir.1982); *Adcock v. Brakegate, Ltd.*, 247 Ill.App.3d 824, 187 Ill.Dec. 428, 617 N.E.2d 885 (1993); *Thorp Loan & Thrift Co. v. Morse*, 451 N.W.2d 361 (Minn.Ct.App.1990); *Caruso v. Krieger*, 698 S.W.2d 760 (Tex.Ct.App.1985); *Southern Ariz. School for Boys, Inc. v. Chery*, 119 Ariz. 277, 580 P.2d 738 (Ct.App.1978); *Columbia Valley Credit Exch., Inc. v. Lampson*, 12 Wash.App. 952, 533 P.2d 152 (1975); *Orkin Exterminating Co. v. Townsend*, 136 Ga.App. 50, 220 S.E.2d 14 (1975); *First Nat'l Bank v. Greene*, 101 Ohio App. 267, 139 N.E.2d 664 (1956). Accordingly, in affirming the judgment and order under review, I would certify conflict with *Cabral*.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 96-3541

CAROLINA WINGS, INC.,
A Florida Corporation,

Plaintiff-Appellant,
Cross-Appellee,

versus

HOOTERS OF AMERICA, INC.,
A Georgia Corporation,

Defendant-Appellee,
Cross-Appellant.

On Appeal from the United States District Court
for the Middle District of Florida

(Filed Mar. 18, 1998)

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC (Opinion _____, 11th Cir., 19__, ___F.2d___).

Before: HATCHETT, Chief Judge, EDMONDSON and COX, Circuit Judges

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate

Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ E.R. Cox
UNITED STATES CIRCUIT JUDGE

GA. CODE ANN. § 13-6-14 (1982)

13-6-14. Number of actions for breach of contract.

If a contract is entire, only one action may be maintained for a breach thereof; but, if it is severable or if the breaches occur at successive periods in an entire contract, an action will lie for each breach; but all the breaches occurring up to the commencement of the action must be included therein. (Orig. Code 1863, § 2880; Code 1868, § 2888; Code 1873, § 2939; Code 1882,§ 2939; Civil Code 1895, § 3793; Civil Code 1910, § 4389; Code 1933, § 20-1401.)

28 U.S.C. § 1738

§ 1738. State and Territorial statutes and judicial proceedings; full faith and credit

The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or possession thereto.

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

(June 25, 1948, c. 646, 62 Stat. 947.)

DEVELOPMENT AGREEMENT
FOR
HOOTER'S RESTAURANTS

THIS AGREEMENT, made and entered into this 29th day of August, 1988, by and between Neighborhood Restaurants of America, Inc., a Georgia corporation (hereinafter "Neighborhood") and Carolina Wings, Inc. a corporation registered to do business in the State of Florida (hereinafter the "Carolina"):

WITNESSETH:

WHEREAS, Neighborhood is engaged in the business of owning and operating a distinctive style of restaurants under the "Hooter's System," as hereinafter defined;

WHEREAS, Neighborhood is the exclusive licensee of the Hooter's System pursuant to a License Agreement, dated July 21, 1984, between Neighborhood and Hooter's, Inc. (the "License Agreement");

WHEREAS, Neighborhood has developed a business plan and method in connection with the operation of such Restaurants developed under the Hooter's System for providing products and services utilizing certain standards, specifications, methods, procedures, recipes, techniques, management systems, identification schemes and proprietary marks and information, all of which may be changed, improved and further developed from time to time by Neighborhood (hereinafter the "Hooter's System");

WHEREAS, the distinguishing characteristics of the Hooter's System, which characteristics Neighborhood

believes are important to the image in the public's mind of the facilities operated under the Hooter's System and are also important to the ability of Hooter's to compete effectively with other restaurants, include, but are not limited to: (i) the name and mark "Hooter's®," and such other substitute trademarks, tradenames, service marks, signs, logos, designs (including the unique design of Restaurants developed under the Hooter's System), symbols, slogans, emblems, and other marks and identifying characteristics, whether or not registered, copyrighted, or patented, which Neighborhood may now use in connection with the operation of Hooter's System Restaurants; (ii) a unique and readily recognizable layout and furnishings for the premises where such business is conducted; (iii) methods of preparation, serving and merchandising food products utilizing certain standards, specifications, procedures, management systems, techniques and identification schemes; and (iv) the use of specially prepared food products, recipes, components and ingredients; all of which characteristics may be changed, improved and further developed from time to time; and

WHEREAS, Carolina wishes to joint venture with Neighborhood the development and ownership of up to six (6) Restaurants under the Hooter's System (including the Hooters of Raleigh Joint Venture Restaurant);

NOW, THEREFORE, for and in consideration of the premises, and the mutual covenants contained herein, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereto do hereby agree as follows:

1. *JOINT VENTURE.* Subject to the terms and conditions set forth in this Agreement, Neighborhood grants to Carolina the right of first refusal to participate in the ownership of up to six (6) Hooter's System Restaurants as described in Section 2 hereof (including Hooter's of Raleigh Joint Venture Restaurant). Each Hooter's System Restaurant developed pursuant to this Agreement shall be owned and operated by a separate joint venture between a corporation wholly-owned by Neighborhood and a corporation wholly owned by Carolina. The two (2) such corporations shall enter into a joint venture agreement in the form of the Agreement attached hereto as Exhibit "A" (the "Joint Venture Agreement") Carolina shall be entitled to participate in the development and Neighborhood shall be obligated to provide Carolina the opportunity to participate in the development including build to suit Hooters System Restaurant of a total of six (6) Hooters System Restaurants (including the Hooter's System Restaurant developed in Raleigh, North Carolina under a joint venture agreement between Hooter's of Raleigh, Inc. and Carolina dated May ___, 1988) under the terms of this Agreement.

2. *TERRITORY.*

(a) Carolina shall have the right to joint venture with Neighborhood on any Restaurant developed under the Hooter's System by Neighborhood anywhere in the United States other than in areas in. which Hooter's Restaurants are being developed or will be developed under other development agreements which were in existence prior to the date of the execution of this Development Agreement and subject to the rights and obligations of Neighborhood

and third parties under prior agreements described below. Areas covered by previously existing Development Agreements and other prior agreements include:

(1) An area in and around Norfolk Virginia specifically defined as the area within the legal city limits of Virginia Beach, Virginia, or Port Smith, Virginia, Chesapeake Virginia and the northern section of North Carolina in which the western boundary is Interstate I95 and the Southern boundary is Highway SR70.

(2) An area between Sarasota, Florida and Fort Myers, Florida specifically defined as Manatee, Sarasota, Charlotte, Lee, Collier counties Florida.

(3) Monroe, Hendry, Broward and Dade counties and that portion of Palm Beach county containing the city of Boca Raton and the area south of and including State Road 782 (Linton Boulevard) as set forth in the Five Guys, Inc. Territory Agreement dated May 11, 1987 in the State of Florida.

(4) An area described as Hillsboro, Pinellas, Pasco, Hernando and Citrus Counties in the state of Florida.

(5) In addition, any contrary provisions in this Agreement notwithstanding, Carolina shall not be entitled to participate in the development of any Restaurant developed under the Hooter's System already opened and operating as of the date of the execution of this Joint Venture Development Agreement.

(6) four (4) additional Joint Venture restaurants developed between Kentucky Wings, Inc. and a wholly-owned subsidiary corporations of Neighborhood (including a joint venture restaurant developed in Daytona, Florida at 2100 Volusia Avenue, Daytona Beach, Florida in the states of Georgia and Florida, exclusively).

(7) Kentucky Wings, Inc., a Kentucky Corporation, Franchise Territories.

Kentucky, Tennessee, Indiana

Ohio, Texas

(8) Contrary provisions contained herein notwithstanding, nothing contained in this Agreement shall restrict or impinge in any way on Neighborhood's right to allow or authorize or enter into agreements with third parties to operate Hooter's System Restaurants under franchise agreements anywhere unless any such Hooter's System Franchise Restaurant shall be located within (15) miles of a Hooter's System Restaurant being constructed or operated under this Joint Venture Agreement.

3. *SITE SELECTION.*

(a) The selection of sites for the Hooter's System Restaurants to be developed hereunder and the pace of development shall be in the sole discretion of Neighborhood. Neighborhood shall notify Carolina in writing by certified mail prior to undertaking the site selection process for each Hooter's System Restaurant to be developed under this Agreement. Within ten (10) days of such notice, Carolina shall pay to

Neighborhood the sum of twenty five thousand dollars ($25,000.00) to compensate Neighborhood for its expenses in connection with site feasibility efforts for Hooter's System Restaurant and architectural and engineering fees associated with the proposed Hooter's System Restaurant.

(b) With respect to any proposed site for Hooter's System Restaurants, Neighborhood shall prepare and submit to Carolina the following:

(i) A copy of the lease for the site at which the Hooter's System Restaurant is to be located (the "Site Lease");

(ii) A construction and development budget for the Hooter's System Restaurant, which shall set forth the anticipated costs and expenses to be incurred with respect to the construction and development of the Hooter's System Restaurant, including, labor, materials, supplies, equipment, and other materials and supplies (the "Budget");

(iii) A set of plans and specifications for construction with respect to the Hooter's System Restaurant (the "Plans and Specifications");

(iv) A construction schedule for the Hooter's System Restaurant, which shall set forth the anticipated time which will be needed for the construction and development of the Hooter's System Restaurant (the "Construction Schedule"); and

(c) Carolina shall have fifteen (15) days from the receipt of the Site Lease, Budget, Plans and Specifications, and Construction

Schedule (herein collectively referred to as the "Construction Documents") to elect to participate in such Hooter's System Restaurant. Such election shall be made by written notice of such to Neighborhood on or before the expiration of such fifteen (15) day period. The failure of Carolina to give written notice of its election to participate shall constitute an election not to participate for the purposes hereof. If Carolina shall elect to participate in the development of such Hooter's System Restaurant, it shall form and own and control 100% of a corporation, which corporation shall execute the Joint Venture Agreement with a corporation formed and owned and controlled 100% by Neighborhood. Within seven (7) days after the expiration of the above-described fifteen (15) day period, the Joint Venture Agreement for such Hooter's System Restaurant shall be executed, and upon such execution, the corporation formed and owned by the Carolina shall make the capital contribution required by Section 4.2 of the Joint Venture Agreement.

(d) In the event Carolina fails to participate in the development of such Hooter's System Restaurants, then within six (6) months of the expiration of the above described fifteen (15) day period, Neighborhood shall refund to Carolina any amounts paid to Neighborhood by Carolina pursuant to Section 3(a) hereof.

4. *DEVELOPMENT AND MANAGEMENT FEES.*

(a) In consideration for the grant by Neighborhood of the right and opportunity to participate in the development of up to six (6) Hooter's System Restaurants in the Territory,

Carolina shall pay to Neighborhood a nonrefundable development fee of ($50,000.00) paid in cash at closing.

Neighborhood and Carolina acknowledge and agree that the development fee set forth above is in consideration for the opportunity to participate in the development of Hooter's System Restaurants. The development fee shall be deemed fully earned and non-refundable upon receipt by Neighborhood. In the event Carolina chooses not to participate in the development of all six (6) Hooter's System Restaurants contemplated in this Agreement, it shall be entitled to no refund of any previously paid development fee. However, the contrary provisions in this Agreement notwithstanding, if Neighborhood fails to offer Carolina the right to participate in the development of at least one Hooter's System Restaurant within nine (9) months from the date this Agreement is signed by both parties, Carolina shall be entitled to repayment of all funds paid to Neighborhood under this Agreement within thirty (30) days after the expiration of the nine (9) month period but Carolina shall have no other claim for damages whatsoever.

(b) Neither Neighborhood, any corporation owned by Neighborhood, nor any joint venture formed pursuant to this Agreement, shall be responsible for any expense incurred by Carolina.

5. *SALE OF HOOTER'S SYSTEM RESTAURANTS.* Neighborhood shall have the authority to sell the Hooter's System Restaurants developed under this

Agreement, either individually, in total, or in any combination thereof. Notwithstanding the foregoing, Neighborhood may not sell any Hooter's System Restaurant developed under this Agreement for an amount less than six (6) times the pre-tax profits of such restaurant. In the event Neighborhood shall sell the Hooter's System Restaurants for a price which is greater than six (6) times the pre-tax profits of Hooter's Systems Restaurants then Carolina shall receive an amount equal to that same multiple times the pre-tax profits of Hooter's System Restaurants developed by Carolina.

Pursuant to the terms of this Agreement Neighborhood will not sell, transfer or convey or assign in any manner any right, title or interest in the Hooter's System Restaurants developed under this Agreement for ninety (90) days from date of this Agreement.

For the purpose of this section, pre-tax profits shall be determined as follows:

(a) For a Hooter's System Restaurant that has been in operation for more than one (1) year, the pre-tax profits shall be computed according to generally accepted accounting principles for the most recent thirteen (13) accounting periods completed by the joint venture owning such restaurant;

(b) For a Hooter's System Restaurant that has been in business longer than seven (7) accounting periods, but less than one (1) year, the pre-tax profits shall be determined based upon generally accepted accounting principles and shall be calculated for the number of accounting periods the restaurant has been open and then annualized so

as to determine what the pre-tax profits would have been had the restaurant remained open for thirteen (13) accounting periods at the rate of earnings established by the number of accounting periods the restaurant has been open;

(c) For a Hooter's System Restaurant that has been open less than seven (7) accounting periods, the pre-tax profits shall be determined based upon generally accepted accounting principles and shall be calculated for the number of accounting periods the restaurant has been open, excluding the first accounting period of the restaurant's operation, and then annualized so as to determine what the pre-tax net profit would have been had the restaurant remained open for thirteen (13) accounting periods at the rate of earnings established by the above procedure; and

(d) For a Hooter's System Restaurant which is not opened for more than two accounting periods or is under construction at the time of sale, (construction to be defined as having a valid building permit from the appropriate municipal authorities issued to Neighborhood to build the restaurant in question), Carolina shall be entitled to 125% of its total cash investment in the specific Hooter's System Restaurant.

In addition, Carolina would also receive all capital expenses already incurred in the construction of any Hooter's System Restaurants under construction and not already open and operating at the time of sale not to exceed the

amount of Capital Contributions of Carolina for the particular Hooter's System Restaurant. Carolina shall not be reimbursed for any labor costs or expenses incurred directly by officers or employees of Carolina or by Carolina for the use of officers or employees of Carolina in connection with the development of the Hooter's System Restaurants not open but under construction at the time of sale.

(e) Neighborhood shall make its best effort to sell all interests in the Hooter's System and Hooter's System Restaurants developed under this Agreement as a whole and intact. However, regardless of whether Neighborhood is able to accomplish a sale in this manner, for the purposes of this agreement the purchase price received for the sale of all or any portion or interest of the Hooter's System or the Hooter's System Restaurants developed under this agreement shall be allocated so that the portion of the purchase price allocated to the earnings multiple of each Hooter's System Restaurant developed under this agreement, and the portion of the purchase price allocated to the earnings multiple of Royalty payments, due to Neighborhood in connection with the operation of Hooter's System Restaurant developed under this agreement, is no less than the same mathematical ratio the Hooter's System Restaurant earnings multiple bears to the Neighborhood Royalty earnings multiple on an annualized basis for the fiscal year in which any such sale takes place.

6. TRANSFER AND ASSIGNMENT OF NEIGHBORHOOD'S INTEREST IN HOOTER'S SYSTEM RESTAURANTS

(a) *General Prohibition.* Neighborhood shall not assign, convey, sell transfer, encumber or in any way alienate all or any part of Neighborhood's interest in the Hooter's System Restaurants developed under this Agreement without the prior written consent of the Carolina. In the event Neighborhood's interest is sold or transferred with such consent, the purchaser shall, upon compliance (but not until such compliance) with the provisions of Section 6(a) hereof, succeed to the interest of Neighborhood and all rights, duties and obligations under this Agreement.

(b) *Right of First Refusal.* Section 6(a) notwithstanding, in the event Neighborhood desires to sell its interest in the Hooter's System Restaurants developed under this Agreement, Neighborhood (the "Selling Venturer") shall first notify Carolina of its intentions to sell its interest in the Hooter's System Restaurants and use the following procedure. Neighborhood shall first receive a bona fide written offer (the "Initial Offer") to purchase Neighborhood's interest in the Hooter's System Restaurants developed under this Agreement and, before Neighborhood may accept the Initial Offer, Neighborhood shall offer to sell its interest in the Hooter's System Restaurants developed under this Agreement in the following manner:

(i) Neighborhood shall deliver a copy of the Initial Offer to Carolina as well as a written offer to sell its interest in the Hooter's System Restaurant developed under this Agreement to

Carolina (the "Duplicate Offer"). The purchase price and other terms and conditions of the Duplicate Offer shall be the same as stated in the Initial Offer.

(ii) Carolina shall have thirty (30) days after receipt and the Duplicate Offer to accept the Duplicate Offer by delivery of a written acceptance to the Neighborhood.

(iii) The closing of the purchase of Neighborhood's interest in the Hooter's System Restaurants pursuant to Subsection (ii) shall take place on the closing date and upon the terms and conditions specified in the Initial Offer.

(iv) If Carolina does not accept the Duplicate Offer pursuant to Subsection (ii), then the Neighborhood shall have the right to sell its interest in the Hooter's System Restaurants developed under this Agreement to the person making the Initial Offer; provided, the sale must be precisely upon the terms and conditions as set forth in the Initial Offer. In the event the Neighborhood's interest in the Hooter's System Restaurants developed under this agreement is not so sold, it shall thereafter again become subject to the terms and conditions of this Section 6.

(c) The rights and obligations under Section 6 are subject and subordinate to the rights and obligations of Neighborhood with third parties as set forth in the License Agreement and the Joint Venture Development Agreement with Kentucky Wings, Inc., dated February 18, 1986, as amended.

7. *FEES UNDER LICENSE AGREEMENT.* Neighborhood agrees to sublicense its rights under the License

Agreement to a corporation formed by Neighborhood to participate in any joint venture formed pursuant to this Agreement. Carolina and Neighborhood acknowledge that under the License Agreement, Hooter's, Inc. is entitled to a royalty of three percent (3%) of gross revenue of any Hooter's System Restaurant developed by Neighborhood. Carolina agrees that any joint venture formed pursuant to this Agreement will be obligated to pay such three percent (3%) royalty on its gross revenue and that the Joint Venture Development Agreement is subject to all rights, restrictions and obligations set forth in the License and Sublicense Agreement.

8. *NON-COMPETITION; CONFIDENTIALITY.*

(a) Carolina, and persons controlling, controlled by or under common control with Carolina, shall not, except upon Neighborhood's prior written consent, directly or indirectly, manage, operate, or have any direct or indirect ownership interest in any restaurant with a concept similar to the Hooter's System at any location within the Territory during the term of this Agreement or for a period of two years following termination or expiration hereof. (Except that if applicable state laws further limit the geographic area or time period for noncompetition, the maximum geographic area or time period for which such restrictions against competition are enforceable under such state law shall govern.) During the term of this Agreement, any officer or agent of Neighborhood shall have the right to inspect any restaurant in which Carolina or any person controlling, controlled by or under common control with Carolina has an interest at reasonable times and

during normal business hours to the extent reasonably necessary to determine whether the conditions of this section are being satisfied. If, by reason of such inspections, or otherwise, Neighborhood has reason to believe that Carolina is not in full compliance with the terms of this section, Neighborhood shall give notice of such default to Carolina, specifying the nature of such default. Upon receipt of such notice, Carolina shall immediately take all actions necessary to cure such default in a manner satisfactory to Neighborhood.

(b) Carolina acknowledges that during the course of this Agreement, it will become privy to trade secrets and other confidential and proprietary information, knowledge and know-how related to the Hooter's System or related to the products, recipes, ingredients, services, standards, specifications, systems, procedures and techniques authorized for use as a part of or in connection with the Hooter's System or in the construction, management, or operation of Hooter's System Restaurants. All such trade secrets, information, knowledge and know-how not generally known in the restaurant business shall be deemed to be "Confidential Information" for purposes of this Agreement. Carolina acknowledges that the Confidential Information is and shall remain the sole, exclusive, and valuable property of Hooter's, Inc. and Neighborhood and that Carolina has and shall acquire no right, title or interest therein. Carolina agrees that neither it nor any person controlling, controlled by or under common control with Carolina, nor any of its officers, employees or agents, shall at any time without Neighborhood's prior written consent, disclose or use or authorize or

permit the use of any Confidential Information, in whole or in part, or otherwise making any such Confidential Information directly or indirectly available to any unauthorized person. Carolina shall take all appropriate steps to assure that the foregoing obligation of Carolina with respect to the Confidential Information shall continue throughout the term hereof, the term of any Joint Venture Agreement contemplated herein, and at all times thereafter so long as such Confidential Information remains trade secrets.

(c) All rights and remedies of Neighborhood and Carolina enumerated in this Agreement shall be cumulative and, except as specifically contemplated otherwise in this Agreement, none shall exclude any other right or remedy allowed at law or in equity and said rights or remedies may be exercised and enforced concurrently. Carolina acknowledges that any violation of its covenants or obligations under this Section 8 may cause irreparable harm to Neighborhood and that damages are not an adequate remedy. Carolina therefore agrees that Neighborhood shall be entitled to injunctive and other forms of equitable relief to enforce such covenants and obligations. The foregoing shall not be construed to limit in any way Neighborhood's right to enforce such covenants or obligations in any other manner, or Neighborhood's rights to injunctive or equitable relief with respect to any other terms of this Agreement or any other agreement between the parties.

9. *ACKNOWLEDGMENTS.* Carolina acknowledges, warrants, represents that:

(a) Carolina has conducted an independent investigation of the business contemplated by this Agreement and recognizes that it involves business risks making the success of the venture dependent upon many factors. Neighborhood expressly disclaims the making of, and Carolina acknowledges that it has not received or relied upon, any warranty, representation or guarantee, express or implied, as to the potential volume, profits or success of the business venture contemplated by this Agreement.

(b) Carolina has no knowledge of any representations by Neighborhood or its officers, directors, shareholders, employees, agents or servants, about the business contemplated by this Agreement that are contrary to the terms of this Agreement or the documents incorporated herein.

10. *NOTICE.* Whenever any notice or other communication is required or permitted to be given under any provision of this Agreement, such notice or other communication shall be in writing, signed by or on behalf of the person giving such notice or other communication, and shall be deemed to have been given when:

(i) Personally delivered;

(ii) When received by prepaid cable or wire; or

(iii) Unless mailed during a national postal strike, five (5) business days after mailing by certified mail, postage prepaid, with return receipt requested (if available), addressed to the person or persons to whom such notice is to be given at the respective

addresses set forth below the Venturer's name on the signature page hereof.

11. *SEVERABILITY.* If any provision of this Agreement is held to be illegal, invalid, or unenforceable under present or future laws effective during the term of this Agreement, the legality, validity, and enforceability of the remaining provisions of this Agreement shall not be affected thereby, and in lieu of each such illegal, invalid, or unenforceable provision there shall be automatically added, as part of this Agreement, a provision as similar in terms to such illegal, invalid, or unenforceable provision as may be possible and be legal, valid and enforceable.

12. *COUNTERPART EXECUTION.* This Agreement may be executed in any number of counterparts with the same effect as if all of the parties had signed the same document. All counterparts shall be construed together and shall constitute a single agreement.

13. *FURTHER ACTION.* Each party to this Agreement shall execute and deliver such papers, documents, and other instruments and perform such acts as are necessary or appropriate to implement the terms hereof and the intent of the parties hereto.

14. *SECTION HEADINGS.* Section headings contained in this Agreement are for reference purposes only and are in no way intended to describe, interpret, define, amplify or limit the scope or extent of the provisions of this Agreement or the intent of parties hereto.

15. *GENDER.* The use of any gender in this Agreement will be deemed to include all genders when appropriate, and use of the singular will be deemed to include

the plural when appropriate and vice versa in each instance.

16. *JURISDICTION.* It is the intention of the parties hereto that the laws of the State of Georgia govern the determination of the validity of this Agreement, the construction of its terms, and the interpretation of the rights and duties of the parties hereto.

17. *PARTIES IN INTEREST.* Except as otherwise provided herein, the covenants, terms, provisions and agreements herein contained shall be binding upon and shall inure to the benefit of the heirs, legal representatives, successors and assigns of the respective parties to this Agreement.

18. *INTEGRATED AGREEMENT.* This Agreement and the Joint Venture Agreement constitute the entire understanding and agreement among the parties hereto with respect to the subject matter hereof, and there are no Agreements, understandings, restrictions, representations, or warranties among the parties, other than those set forth and for which provision is made herein.

19. *AMENDMENT.* This Agreement may be amended only by a written instrument signed by all of the parties hereto.

20. *ASSIGNMENT.* This Agreement is personal to Carolina and Carolina shall not sell, assign, transfer or encumber this Agreement or any right or interest hereunder, nor shall Carolina permit any such assignment, transfer or encumbrance to occur by operation of law or

otherwise, without the prior written consent of Neighborhood. Any such assignment or transfer of any such interest shall constitute a material breach of this Agreement.

21. *RESTRICTION OF SALE OF JV CORPORATION.*

(a) Neighborhood hereby agrees and covenants that it shall not transfer, convey encumber or assign any rights it possesses in connection with the ownership of one hundred percent (100%) of any wholly owned subsidiary corporations of Neighborhood (hereinafter JV corporations) which has entered into a Joint Venture Agreement with a wholly-owned subsidiary entity of Carolina unless and until:

(i) Hugh H. Connerty, Jr. holds no less than 50% ownership interest in the corporation, partnership or other entity which is assigned the Neighborhood's ownership interest in JV Corporation and that such Corporation, partnership or other entity receiving Neighborhood's assignment of ownership interest in JV Corporation agrees to the same restrictions on transfer of its ownership interest in Raleigh as set forth in the letter.

(ii) Carolina has received a full repayment of its Capital Contribution as defined by the Joint Venture Agreement, or

(iii) unless and until the person offering to purchase Neighborhood's ownership interest in JV Corporation offers to purchase the interest of Carolina in the Joint Venture Agreement for the same amount as the purchase price of Neighborhood's one hundred

percent (100%) ownership interest in JV Corporation, or

(iv) unless NRA first receives written authorization to sell said ownership interest in JV Corporation, from Carolina.

(b) Carolina hereby agrees not to transfer majority interest in each JV corporation formed by Carolina without prior written consent from NRA.

IN WITNESS WHEREOF, the parties have caused this instrument to be executed on this ___ day of _____, 1988.

NEIGHBORHOOD RESTAURANTS OF AMERICA, INC.

ATTEST:

/s/ Illegible

By: /s/ James W. Hammond, Jr.
James W. Hammon, Jr.,
President

(CORPORATE SEAL)

CAROLINA WINGS, INC.

ATTEST:

/s/ Illegible

By: /s/ Kent Schmidt
Kent Schmidt,
President

(CORPORATE SEAL)